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Ng Yu Wah v Public Prosecutor

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HIGH COURT (PULAU PINANG) — CRIMINAL APPEAL NO 42H-89–10 OF 2011
ZAMANI A RAHIM J
21 MARCH 2012

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Criminal Procedure — Charge — Defective charge — Appellant charged with trafficking child — Charge failed to mention expression 'for the purpose of exploitation' or particulars of exploitation — Whether charge framed against appellant defective — Whether appellant misled in her defence — Whether defect could be cured — Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ss 2 & 14 — Child Act 2001 s 48 — Criminal Procedure Code s 422

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The appellant and another ('the co-accused') were jointly charged with trafficking a child aged two months, an offence under s 14 of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ('the Act') read together with s 34 of the Penal Code. Mid-way through the prosecution's case the co-accused changed her plea to one of guilty and testified for the prosecution against the appellant. At the close of the trial, the appellant was found guilty, convicted and sentenced to five years imprisonment. Hence the present appeal against conviction and sentence. The appellant submitted that the charge against her was badly framed and thus defective. The appellant argued that the purpose of exploitation was an essential ingredient of the offence under s 14 of the Act, and that since the instant charge neither mentioned the expression 'for the purpose of exploitation' nor stated the mode or particulars of exploitation it was a defective charge. The prosecution submitted that the appellant, who was involved in the adoption or purchase of the baby, had committed an illegal act that was contrary to s 48 of the Child Act 2001. It was thus the prosecution's case that such 'illegal activity' amounted to exploitation as defined in s 2 of the Act.

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Held, allowing the appeal and acquitting and discharging the appellant:

(1) The expression 'for the purpose of exploitation' under s 14 of the Act, which was the mens rea of the offence, had to be expressly stated in the charge. The section required the prosecution to state the mode of the exploitations. However, the charge in the present case totally omitted to mention the expression 'for the purpose of exploitation' or one or more of the forms of exploitation as defined in s 2 of the Act. Further, the fact that the prosecution was relying on an offence under s 48 of the Child Act should also have been brought to the attention of the appellant. Since the material statutory words denoting *mens rea*, which was an essential

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ingredient of the offence, were omitted from the charge, the indictment was defective. The defect was not curable under s 422 of the Criminal Procedure Code (see para).

(2) It was incumbent upon the prosecution to specifically mention the illegal activity it was relying upon and the offending section of the law in the charge. The appellant had to be informed precisely and with accuracy the main ingredients of the charge against her so that she could prepare her defence in the best possible way she thought fit (see para 18).

[Bahasa Malaysia summary

Perayu dan seorang lagi (tertuduh bersama) dituduh bersama menyeludup kanak-kanak berumur dua bulan, kesalahan di bawah s 14 Akta Antipemerdagangan Orang 2007 ('Akta') dibaca bersama dengan s 34 Kanun Keseksaan. Dipertengahan perjalanan kes pihak pendakwaan tertuduh menukar rayuan kepada bersalah dan memberi keterangan bagi pihak pendakwaan terhadap perayu. Di akhir perbicaraan, perayu didapati bersalah, disabitkan dan dihukum penjara lima tahun. Maka rayuan ini terhadap sabitan dan hukuman. Perayu berhujah bahawa tujuan eksploitasi adalah unsur penting kesalahan di bawah s 14 Akta, dan memandangkan tuduhan ini tidak menyebut penyataan 'for the purpose of exploitation' dan juga menyatakan cara atau butir-butir eksploitasi ia adalah tuduhan cacat. Pihak pendakwaan berhujah bahawa perayu, orang yang terlibat di dalam pengambilan anak atau membeli kanak-kanak, telah melakukan kegiatan haram yang bertentangan s 48 Akta Kanak-Kanak 2001 ('AKK'). Oleh itu kes pihak pendakwaan bahawa 'illegal activity' sedemikian merupakan eksploitasi seperti yang dimaksudkan di dalam s 2 Akta.

Diputuskan, membenarkan rayuan dan melepaskan dan membebaskan perayu:

(1) Penyataan 'for the purpose of exploitation' di bawah s 14 Akta, yang mana adalah mens rea kesalahan, mesti dinyatakan secara jelas di dalam tuduhan. Seksyen tersebut memerlukan pihak pendakwaan menyatakan cara eksploitasi tersebut. Walau bagaimanapun, tuduhan dalam kes ini secara keseluruhan tertinggal daripada menyatakan penyataan 'for the purpose of exploitation' atau satu atau lebih bentuk-bentuk eksploitasi seperti yang dimaksudkan di dalam s 2 Akta. Selanjutnya, fakta bahawa pihak pendakwaan bergantung atas kesalahan di bawah s 48 AKK patut diberitahu kepada perayu. Memandangkan perkataan-perkataan statutori material bererti *mens rea*, yang mana adalah unsur penting kesalahan, tidak dinyatakan di dalam tuduhan, indikmen adalah cacat. Kecacatan tersebut tidak dapat diselesaikan di bawah s 422 Kanun Acara Jenayah (lihat perenggan).

(2) Adalah wajib ke atas pihak pendakwaan untuk menyatakan secara khusus

A aktiviti haram yang ia guna dan seksyen kesalahan undang-undang di dalam tuduhan. Perayu mesti diberitahu secara tepat dan dengan ketepatan unsur-unsur utama tuduhan terhadapnya dengan itu dia dapat menyediakan pembelaannya sebaik mungkin yang dia rasa berkesan (lihat perenggan 18).]

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Notes

For cases on defective charge, see 5(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1178–1213.

C **Cases referred to**

Basri bin Md Desa v PP [2010] MLJU 1030; [2011] 1 CLJ 884, HC (refd)
Choong Loke Kian & Anor v Public Prosecutor [2012] MLJU 221, HC (refd)
PP v Teoh Choon Teck [1963] 1 MLJ 34; [1962] 1 LNS 141 (refd)
Santosh Kumari v State of Jammu And Kashmir & Ors (2011) 9 SCC 234 (refd)
D *Siti Rashidah bt Razali dan yang lain lwn Pandakwa Raya* [2011] 6 MLJ 417; [2011] 9 CLJ 459, HC (folld)

Legislation referred to

Adoption Act 1952 ss 2, 4, 31
E Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ss 2, 14
Child Act 2001 s 48, 48(4)(a), (b)
Criminal Procedure Code s 422
Penal Code s 34

F *RSN Rayer (R Nethaji Rayer & Co) for the appellant.*
Suhaimi bin Ibrahim (Head of Prosecution Unit) for the respondent.

Zamani A Rahim J:

G **[1]** The appellant ('accused') was jointly charged with trafficking a child, Hafiza Aqilah bt Abdullah, aged two months, an offence under s 14 of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 read together with s 34 of the Penal Code. The charge reads as follows:

H Bahawa kamu bersama-sama pada 26 Jun 2009, jam lebih kurang 10.30 pagi bertempat di Blok W, Taman Pelangi, Bukit Tengah, dalam Daerah Seberang Perai Tengah, dalam Negeri Pulau Pinang, telah memperdagangkan seorang kanak-kanak perempuan Hafiza Aqilah binti Abdullah, Sijil Kelahiran No. CC 97838 yang berusia 2 bulan. Oleh yang demikian, kamu telah melakukan suatu
I kesalahan di bawah Seksyen 14 Akta Antipemerdagangan Orang 2007 dan boleh dihukum di bawah peruntukan yang sama dan dibaca bersama-sama di bawah Seksyen 34 Kanun Keseksaan.

[2] At the commencement of the trial, the accused was jointly charged with

one Lindawati bt Rezuan, an Indonesian national and half-way through the prosecution's case, the said Lindawati had changed her plea to one of guilty. She was found guilty, convicted and she was sentenced to three years imprisonment from the date of arrest. Lindawati had turned into a crown witness and testified for the prosecution. She was SP5.

[3] There is no necessity for me to narrate the facts of the prosecution's case, suffice to say that at the end of the whole trial, the accused was found guilty, convicted and sentenced to five years imprisonment with effect from the date of conviction ie 24 August 2011.

[4] Hence this appeal.

[5] This is yet another problem in drawing up a valid and proper charge for offences, outside the Penal Code. This is a case under the Anti-Trafficking of Persons Act 2007. It is a relatively recent statute coming into force on 1 October 2007. The framing of charges under 2007 Act requires care and adroitness, in this aspect of the adjectival law pertaining to charges, I had occasion to deal with it in *Basri bin Md Desa v Public Prosecutor* [2010] MLJU 1030; [2011] 1 CLJ 884 as follows:

> The problem of formulating a legally correct charge do at times crop up in the magistrate's and sessions courts. This problem may be avoided if the prosecuting officers or learned deputies, who frame the charges are meticulous and address their mind to them. When charges are brought and read in courts, the judges of the sessions courts and magistrates must ensure that the charges are properly worded in accordance with the wordings of the statute under which the accused or offender is charged. Extra attention must be given to charges which involved rare and unfamiliar offences. If charges are found to be defective in law, a short adjournment may be sought to have them rectified. I would also advise the prosecuting officers or learned deputies to refer to *Ratanlal & Dhirajlal's Law of Crimes* for specimen charges of offences under our Penal Code or better still to compile a correct specimen of charges for offences under our Penal Code and for various offences under other statutes such as Dangerous Drugs Act 1952, Corruption Act 1997, Immigration Act 1963, Customs Act 1967 etc.

[6] In *Santosh Kumari v State of Jammu And Kashmir & Ors* (2011) 9 SCC 234 which was reported in [2012] 2 CLJ 1, in discussing the provision relating to framing of charge as contained in the Code of Criminal Procedure 1989 which is applicable to the State of Jammu and Kashmir, JM Panchal SCJ said:

> The provisions relating to framing of charge against the accused before the trial commences, are contained in the Code of Criminal Procedure, 1989 (1933 AD) which is applicable to the State of Jammu and Kashmir. The statute requires that every charge framed under the said Code should state the offence with which the accused is charged and if the law which creates the offence gives it any specific

A name, the offence should also be described in the charge by that name only. The statute further requires that the law and section of the law against which the offence is said to have been committed has to be mentioned in the charge. It is a fundamental principle of criminal law that the accused should be informed with certainty and accuracy the exact nature of the charge brought against him. The
B object of the statement of particulars to be mentioned in the charge is to enable the accused person to know the substantive charge he will have to meet and to be ready for it before the evidence is given. The extent of the particulars necessary to be given in the charge depends upon the facts and the circumstances of each case.

It is well-settled law that in drawing up a charge, all verbiage should be avoided.
C However, a charge should be precise in its scope and particular in its details. The charge has to contain such particulars as to the time and place of the alleged offence and the person against whom it was committed as are reasonably sufficient to give the accused notice of the matter with which he is charged. One of the requirements of law is that when the nature of the case is such that the particulars mentioned in the charge do not give the accused sufficient notice of the matter with which he is
D charged, the charge should contain such particulars of the manner in which the alleged offence was committed as would be sufficient for that purpose. If A is accused of the murder of B at a given time and place, the charge need not state the manner in which A murdered B.

E **[7]** In this case, the accused was said to commit the offence under s 14 of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007: s 14 provides as follows:

F Any person, who traffics in persons being a child, *for the purpose of exploitation,* commits an offence and shall, on conviction, be punished with imprisonment for a term not less than three years but not exceeding twenty years, and shall also be liable to fine.

(Emphasis added.)

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[8] The word 'exploitation' is defined in s 2 of the Act to mean all forms of sexual exploitation, forced labour or services, slavery, servitude, any illegal activity or the removal of human organ. The purpose of exploitation is an essential ingredient which is a mens rea of the offence. Therefore, s 14 of the
H Act requires the mens rea or mental element of the accused to be established under the section. The section requires the prosecution to state the mode of the exploitations.

[9] Before I examine the charge in the instant case, I propose to refer to the
I Kota Bharu High Court case of *Siti Rashidah bt Razali dan yang lain lwn Pandakwa Raya* [2011] 6 MLJ 417; [2011] 9 CLJ 459 wherein Azman Abdullah J said that the expression 'exploitation' is defined in s 2 of the Act and listed its form or mode as follows:

Sek(1.)

(2) Kerja atau Perkhidmatan paksa.

(3) Perhambaan.

(4) Amalan yang menyerupai perhambaan.

(5) Pengabdian.

(6) Apa-apa aktiviti menyalahi undang-undang.

(7) Pemindahan organ manusia.

[10] His Lordship went on to observe the charge in *Siti Rashidah Razali & Yang Lain*'s case, as follows:

> Bagi tujuan kefahaman kepada pertuduhan di bawah ss 12–14 Akta ini, *adalah dinasihatkan untuk pihak pendakwaan di masa akan datang memasukkan di dalam pertuduhan apakah aktiviti 'eksploitasi' yang dimaksudkan sama ada eksploitasi seks seperti pelacuran, abdi, buruh paksa atau kegiatan haram.* Oleh kerana s 2, memberi maksud 'eksplotasi' itu lebih dari satu kegiatan maka perlu dinyatakan dalam pertuduhan, eskploitasi seks atau buruh paksa atau perhambaan atau pengabdian atau aktiviti haram atau pemindahan organ. Dengan sifat pertuduhan secara spesifik begini ianya lebih menepati kehendak ss 12, 13 atau 14 Akta ini.

[11] This court had the occasion to deal with s 14 of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 about two months ago, on 3 February 2012, during which time the case of *Siti Rashidah & Yang Lain*, was referred to. The same learned deputy in this case appeared before me in that earlier case of *Choong Loke Kian & Anor v Public Prosecutor* [2012] MLJU 221, (Criminal Appeal Nos 42–73 of 2011 and 42–74 of 2011). In this criminal appeal, the charges were also under s 14 of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 read together with s 34 of the Penal Code. The charges are as follows:

(a) Kes Tangkap 62–95 Tahun 2009
Pendakwa Raya v Choong Loke Kian & Yang Wenna:

> Bahawa kamu bersama-sama dengan beberapa orang lagi rakan sejenayah yang masih bebas, pada 26.6.2009 jam lebih kurang antara 1.00 petang hingga 8.00 malam di Bilik No. 1003, Hotel Pearl View, Jalan Baru, Perai, di dalam Daerah Seberang Perai Tengah, di dalam Negeri Pulau Pinang, telah memperdagangkan seorang kanak-kanak bernama MISS NARIRAT

PANYAJAN (No. Pasport: Y 657561) yang berumur 17 tahun, *bagi maksud eksploitasi.* Oleh yang demikian, kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 14 Akta Antipemerdagangan Orang 2007 dan dibaca bersama-sama di bawah Seksyen 34 Kanun Keseksaan.

(b) Kes Tangkap 62–101 Tahun 2009
Pendakwa Raya v Yeoh Teik Meng:

Bahawa kamu bersama-sama dengan dua orang yang telah dituduh dan beberapa orang lagi rakan sejenayah yang masih bebas, pada 26.6.2009 jam lebih kurang antara 1.00 petang hingga 8.00 malam di Bilik No. 1003, Hotel Pearl View, Jalan Baru, Perai, di dalam Daerah Seberang Perai Tengah, di dalam Negeri Pulau Pinang, telah memperdagangkan seorang kanak-kanak bernama MISS NARIRAT PANYAJAN (No. Pasport: Y 657561) yang berumur 17 tahun, *bagi maksud eksploitasi.* Oleh yang demikian, kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 14 Akta Antipemerdagangan Orang 2007 dan dibaca bersama-sama di bawah Seksyen 34 Kanun Keseksaan.

[12] As can be seen, the expression 'bagi maksud eksploitasi' are expressly stated in both the above charges under s 14 of 2007 Act, I am in agreement with Azman Abdullah J in *Siti Rashidah bt Razali*'s case that it is desirable for the prosecution to state the mode or particulars of exploitation to enable the accused person to know the exact charge against him and to make adequate preparation to meet it.

[13] In the instant case, unlike the cases of *Siti Rashidah bt Razali dan yang lain*, and *Choong Loke Kian & Anor*, the charge herein totally omitted to mention the expression 'bagi maksud eksploitasi' let alone to state one or more of the forms of exploitation as defined in s 2 of the Act. However, learned deputy in his written submission contended that the accused was involved in an adoption of the child or she was involved in the purchase of the baby. The accused's activity or what was done by her was certainly illegal said learned deputy, as it was contrary to s 4 of the Adoption Act 1952 or s 48 of the Child Act 2001. Section 4 of 1952 Act states the restrictions on making of adoption orders as follows:

(1) An adoption order shall not be made unless the applicant or, in the case of a joint application, one of the applicants —

(a) Has attained the age of twenty-five and is at least twenty-one years older than the child in respect of whom the application is made unless the Court is satisfied that there are special circumstances for the making of an order;

(b) has attained the age of twenty-one and is a relative of the child; or

(c) is the mother or father of the child.

(2) An adoption order shall not be made in any case where the sole applicant is a male and the child in respect of whom the application is made is a female unless the Court is satisfied that there are special circumstances which justify as an exceptional measure the making of an order.

(3) An adoption order shall not be made in favour of any applicant who is not ordinarily resident in Peninsular Malaysia or in respect of any child who is not so resident.

(4) An adoption order shall not be made in respect of any child unless —

(a) the child has been continuously in the care and possession of the applicant for at least three consecutive months immediately preceding the date of the order; and

(b) the applicant has at least three months before the date of the order by a written notification informed an officer of the Social Welfare Department of the State in which he is for the time being resident of his intention to apply for an adoption order in respect of the child.

[14] Section 4 of 1952 Act has laid down the conditions to be complied with by an aspiring applicant before an adoption order of a child may be made by the court. It is not strictly an offence creating section where non-compliance of 1952 Act will attract criminal liability. Failure to conform with s 4 of 1952 Act cannot be said to fall within the definition of 'exploitation' in s 2 of the 1952 Act which include, inter alia, 'any illegal activity'. Further, according to the birth certificate, P37 the child, Hafiza Aqilah bt Abdullah and her mother, Raji Supriyatni Baniran, SP 4 are Muslims who profess the religion of Islam and the 1952 Act is therefore inapplicable. Section 31 of the 1952 Act reads as follows:

> This Act shall not apply to any person who professes the religion of Islam either so as to permit the adoption of any child by such a person or so as to permit the adoption by any person of a child who according to the law of the religion of Islam is a Muslim.

[15] At the risk of repetition, learned deputy's contention of the applicability of s 4 of 1952 Act is misconceived.

[16] On the other hand, learned deputy had relied on an appropriate statute when he argued that the accused was involved in a transaction to transfer or confer possession, custody or control of the child to the accused on payment of money which is an offence under s 48 of the Child Act 2001. Section 48 provides as follows:

> (1) Any person who takes part in any transaction the object or one of the objects of which is to transfer or confer, wholly or partly, temporarily or permanently, the possession, custody or control of a child for any valuable consideration commits an offence and shall on conviction be liable to a fine not exceeding then thousand ringgit or to imprisonment for a term not exceeding five years or to both.
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> (2) Any person who without lawful authority or excuse harbours or has in his possession, custody or control a child with respect to whom the temporary or permanent possession, custody or control has been transferred or conferred for valuable consideration by any other person within or outside Malaysia commits an offence and shall on conviction be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding five years or to both.
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> (3) For the purpose of subsection (2), if any person harbours or has in his possession, custody or control a child without lawful authority or excuse, the child shall, until the contrary is proved, be presumed to be a child with respect to whom the temporary or permanent possession, custody or control has been transferred or conferred for valuable consideration.
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> (4) It shall be a *defence* in any prosecution under this section to prove that —
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> (a) the transfer took place in contemplation of or pursuant to a bona fide marriage or adoption; and
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> (b) at least one of the natural parents of the child or the guardian of the child was a consenting party to the marriage or to the adoption by the adopting party.
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> And had expressly consented to the particular marriage or adoption.

[17] As the accused's activity or what she had done in relation to the child, Hafiza Aqilah bt Abdullah was illegal, she had therefore violated the Child Act

2001 and her activity amount to 'any illegal activity' within the term of 'exploitation' as defined in s 2 of the Act. A

[18] If the prosecution is relying on the term of 'any illegal activity' as being 'for the purpose of exploitation' under s 2 of the Act, the illegal activity is very wide indeed! It can encompass anything under the sun, so to speak. I am of the considered view that it is incumbent upon the prosecution to specifically mention what that illegal activity is in the charge, including its offending section of the law. Without mentioning in the charge the illegal activity committed by the accused, the accused is reduced to groping in the dark which is definitely unfair to her which may lead to a miscarriage of justice. Needless to say the accused need to be informed precisely and with accuracy the main ingredients of the charge against her so that she can prepare her defence the best possible way she thinks fit. In *Santosh Kumari*'s case, JM Panchal SCJ said: B C D

> It is a fundamental principle of criminal law that the accused should be informed with certainty and accuracy the exact nature of the charge brought against him.

[19] And in *Public Prosecutor v Teoh Choon Teck* [1963] 1 MLJ 34; [1962] 1 LNS 141, Heptworth J said: E

> If there be any one principle of criminal law and justice clearer and more obvious than all others, it is that the offence imputed must be positively and precisely stated, so that the accused may certainly know with what he is charged, and be prepared to answer the charge as best he may. F

[20] In addition, in the context of the learned deputy's submission that the accused activity of transferring or conferring possession, custody or control of the child on payment of money an offence under s 48 of the Child Act, the accused attention must be brought and also a proper explanation be given that a statutory defence is available to her as provided under sub-s (4)(a), (b) of s 48 of the Child Act. G

[21] In the upshot, since the material statutory words denoting mens rea which is an essential ingredient of the offence, on the facts of this case an averment should incorporate the following words namely, 'bagi maksud eksploitasi iaitu pemindahan milikan, jagaan atau kawalan ke atas kanak-kanak tersebut dengan pertukaran wang ringgit menyalahi s 48 Akta Kanak-Kanak 2001 (Akta 611)'. As they were omitted from the charge, the indictment is therefore wholly defective and the defect is not curable under s 422 of the Criminal Procedure Code: see *Basri Md Desa*'s case. H I

A **[22]** Accordingly, the accused appeal is allowed and her conviction and sentence by the trial court is set aside. The accused is therefore acquitted and discharged.

Appeal allowed and appelant acquitted and discharged.

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Reported by Kohila Nesan

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